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14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE DISTRICT OF OREGON

16 SYD A. HASAN,

Civil No. 09-362-AA
OPINION AND ORDER

17 Plaintiff,

18 vs.

19 MICHAEL J. ASTRUE,
Commissioner of Social Security,

20 Defendant.
21

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6 Attorneys for defendant

7 AIKEN, Chief Judge:

8 Claimant, Syd Hasan, brings this action pursuant to the
9 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
10 1383(c)(3), to obtain judicial review of a final decision of the
11 Commissioner denying his application for disability insurance
12 benefits under Title II of the Act. For the reasons set forth
13 below, the Commissioner's decision is reversed and remanded for
14 payment of benefits.

15 **PROCEDURAL BACKGROUND**

16 On April 21, 2006, Administrative Law Judge (ALJ) Charles
17 S. Evans found plaintiff not disabled and denied his petition for
18 disability benefits. Tr. 14-28. Plaintiff appealed to the
19 Appeals Council which issued a denial on November 29, 2006. Tr.
20 507. Plaintiff then appealed to the United States District Court
21 for the District of Oregon. On May 31, 2008, Judge Hogan issued
22 an order remanding the matter to the ALJ to make findings
23 regarding materiality. Specifically, Judge Hogan found that the
24 evidence established that plaintiff was disabled, but there
25 remained a question as to whether drug and/or alcohol abuse was
26 material to plaintiff's disability.

27 Following remand, on September 24, 2008, a second hearing
28 was held before ALJ Evans. In accord with Judge Hogan's Order,
the ALJ asked Dr. Larry Hart, Ph.D, psychologist, to testify
regarding the role that alcohol and/or drugs played, if any, in

1 plaintiff's disability. Dr. Hart testified that there was no
2 evidence that drug and/or alcohol abuse was material to
3 plaintiff's disability.

4 In accord with Judge Hogan's remand, the ALJ found that
5 plaintiff's use of marijuana and/or alcohol was not a severe
6 impairment and was not material to disability. Nevertheless, on
7 February 4, 2009, the ALJ issued a second decision denying
8 plaintiff's petition for benefits and finding plaintiff not
9 disabled. Plaintiff has once again appealed that decision to
10 this court.

11 **STATEMENT OF THE FACTS**

12 The defendant stipulates to plaintiff's recitation of the
13 relevant facts as found in Plaintiff's Statement of Facts (Pl's
14 Brief, p. 4-7).

15 **STANDARD OF REVIEW**

16 This court must affirm the Secretary's decision if it is
17 based on proper legal standards and the findings are supported by
18 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
19 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
20 mere scintilla. It means such relevant evidence as a reasonable
21 mind might accept as adequate to support a conclusion."
22 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
23 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
24 The court must weigh "both the evidence that supports and
25 detracts from the Secretary's conclusion." Martinez v. Heckler,
26 807 F.2d 771, 772 (9th Cir. 1986).

27 The initial burden of proof rests upon the claimant to
28 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486

1 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
2 an "inability to engage in any substantial gainful activity by
3 reason of any medically determinable physical or mental
4 impairment which can be expected . . . to last for a continuous
5 period of not less than 12 months. . . ." 42 U.S.C. §
6 423(d)(1)(A).

7 The Secretary has established a five-step sequential
8 process for determining whether a person is disabled. Bowen v.
9 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520,
10 416.920. First the Secretary determines whether a claimant is
11 engaged in "substantial gainful activity." If so, the claimant
12 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§
13 404.1520(b), 416.920(b).

14 In step two the Secretary determines whether the claimant
15 has a "medically severe impairment or combination of
16 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
17 §§ 404.1520(c), 416.920(c). If not, the claimant is not
18 disabled.

19 In step three the Secretary determines whether the
20 impairment meets or equals "one of a number of listed impairments
21 that the Secretary acknowledges are so severe as to preclude
22 substantial gainful activity." Id.; see 20 C.F.R. §§
23 404.1520(d), 416.920(d). If so, the claimant is conclusively
24 presumed disabled; if not, the Secretary proceeds to step four.
25 Yuckert, 482 U.S. at 141.

26 In step four the Secretary determines whether the claimant
27 can still perform "past relevant work." 20 C.F.R. §§
28 404.1520(e), 416.920(e). If the claimant can work, she is not

1 disabled. If she cannot perform past relevant work, the burden
2 shifts to the Secretary. In step five, the Secretary must
3 establish that the claimant can perform other work. Yuckert, 482
4 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g).
5 If the Secretary meets this burden and proves that the claimant
6 is able to perform other work which exists in the national
7 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

8 DISCUSSION

9 1. The ALJ's Findings

10 Judge Hogan initially issued an Order finding in relevant
11 part, the following:

12 1. The ALJ failed to give legally sufficient reasons for
13 rejecting the opinion of treating psychiatrist Farley, and he
14 erred in relying on the opinion of consultative evaluator Dr.
15 Cheryl Brischetto, Ph.D. If Dr. Farley's opinion were credited as
16 true, it established that plaintiff was disabled under the "C"
17 criteria of Listing 12.04 (disability based upon "Affective
18 Disorders"). Tr. 408, 415-417.

19 2. There was no evidence in the record that plaintiff was
20 malingering, and the ALJ failed to provide "clear and convincing"
21 reasons for finding plaintiff not credible. Tr. 412.

22 3. The ALJ erred in failing to defer to plaintiff's wife lay
23 statement. Tr. 415.

24 4. The evidence established that plaintiff was disabled, however,
25 there remained a question of whether drug and/or alcohol abuse
26 was material to plaintiff's disability. Tr. 408-09.

27 After remand, and pursuant to Judge Hogan's Order, the ALJ
28 credited as true Dr. Farley's opinion and agreed the only issue

1 remaining for the hearing was whether alcohol and/or drug abuse
2 was "material." In his decision the ALJ found:

3 In the previous decision in this case, I found that
4 the claimant's allegations regarding his symptoms
5 and limitations were not fully credible for several
6 reasons[.] The District Court discredited each of
7 those reasons. It concluded that they were not a
8 sufficient basis for rejecting the claimant's
9 allegations and the opinion of Dr. James Farley,
10 the claimant's treating psychiatrist.

11 As explained above, I now find that the claimant's
12 marijuana use [is] not material to the determination
13 of disability. However, I find that reasons (1)
14 through (5) listed above still erode the claimant's
15 credibility.

16 Tr. 384-91.

17 As noted above, in accord with Judge Hogan's remand Order, the
18 ALJ found that plaintiff's use of marijuana and/or alcohol was
19 not a severe impairment and was not material to disability. In
20 direct contravention, however, to Judge Hogan's Order, the ALJ
21 again found plaintiff not disabled by relying on previously
22 rejected rationales. Tr. 387-88.

23 The defendant concedes that the ALJ erred, although, moves
24 to remand this case for additional proceedings. Specifically,
25 the defendant argues that the ALJ should be afforded another
26 opportunity to review plaintiff's part-time work. I disagree.
27 There is no dispute that ALJ Evans was fully aware of plaintiff's
28 part-time work over the years that this case has been pending.
Plaintiff testified about his work at K-Mart during the first
hearing. Tr. 339-42. Plaintiff further testified about the work
he was doing in 2008 at the second hearing. Tr. 473-75. In the
ALJ's decision finding plaintiff not disabled, the ALJ
specifically found that plaintiff had not engaged in substantial

1 gainful activity (SGA) since his alleged onset date. Tr. 383.
2 That finding is not at issue before this court.

3 Defendant's motion for remand is denied. Judge Hogan
4 previously found plaintiff disabled, and the ALJ determined that
5 neither drug nor alcohol abuse was "material" to that finding.
6 There are no legal issues remaining before this court.
7 Therefore, the ALJ's decision finding plaintiff not disabled is
8 reversed and remanded for payment of benefits.

9 **CONCLUSION**

10 The Commissioner's decision is not based on substantial
11 evidence. Therefore, this case is reversed and remanded for
12 payment of benefits. This case is dismissed.

13 IT IS SO ORDERED.

14 Dated this 24 day of June 2010.

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18 Ann Aiken
19 United States District Judge
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